UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

RAFAEL REID, Petitioner, v. WILLIAM GITTERE, et al., Respondents.	Case No. 3:17-cv-00532-HDM-CLB **ORDER**

This counseled habeas petition pursuant to 28 U.S.C. § 2254 comes before the court on the respondents' motion to dismiss (ECF No. 36). The petitioner, Rafael Reid ("Reid"), has opposed (ECF No. 48), and the respondents have replied (ECF No. 54).

I. Procedural Background

Reid challenges his 2015 Nevada state court conviction, pursuant to a guilty plea, of attempt sexual assault and robbery. (Exs. 30 & 47).[1] After filing, and failing to prevail on, a motion to withdraw his guilty plea in the trial court, Reid filed a direct appeal through counsel Michael Sanft. (Exs. 42-44 & 50). The Nevada Court of Appeals affirmed on May 17, 2016, and the Nevada Supreme Court issued remittitur on June 13, 2016. (Exs. 63 & 64).

Reid asserts that he did not learn of the decision on his direct appeal until more than a year later – on July 25, 2017. By

[1] The exhibits containing the relevant state court record cited in this order are located at ECF Nos. 17, 19, 37-40 and 49-50. The court will cite to the respondents' exhibits (located at ECF Nos. 37-40) by exhibit number and to the petitioner's exhibits (located at ECF Nos. 17, 19 and 49) by ECF number.

then, the deadline for filing a state court postconviction petition had passed and the deadline for a federal habeas petition was looming.

Reid filed the instant federal petition on August 29, 2017. The court appointed counsel, and counsel filed an amended petition on July 24, 2018. (ECF No. 16). Counsel also moved to stay and abey proceedings so that Reid could exhaust his claims through a state court postconviction petition. The court granted Reid's motion, and proceedings were stayed while Reid pursued his state court petition.

The state court denied Reid's petition on the grounds it was untimely, and the Nevada Court of Appeals affirmed. (Exs. 71, 79 & 94). Reid subsequently returned to this court and moved to reopen proceedings and for leave to file a second amended petition. The court granted both motions. Reid filed his second amended petition on April 23, 2020. (ECF No. 32). The instant motion to dismiss followed.

II. Timeliness

The respondents argue this action should be dismissed because not one of Reid's three petitions was filed before the federal statute of limitations expired. Reid does not deny that his original and subsequent petitions were filed after the expiration of the statutory limitations period, but he asserts that he should be granted equitable tolling and that his claims otherwise then relate back to a timely filed petition.

The Antiterrorism and Effective Death Penalty Act ("AEDPA") amended the statutes controlling federal habeas corpus practice to

include a one-year statute of limitations on the filing of federal habeas corpus petitions. With respect to the statute of limitations, the habeas corpus statute provides in relevant part:

> A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of . . . the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review . . . .

28 U.S.C. § 2244(d)(1)(A).[2]

A claim in an amended petition that is filed after the expiration of the one-year limitation period will be timely only if the claim relates back to a timely filed claim pursuant to Rule 15(c) of the Federal Rules of Civil Procedure, on the basis that the claim arises out of "the same conduct, transaction or occurrence" as the timely claim. *Mayle v. Felix*, 545 U.S. 644 (2005). In *Mayle*, the Supreme Court held that habeas claims in an amended petition do not arise out of "the same conduct, transaction or occurrence" as prior timely claims merely because the claims all challenge the same trial, conviction, or sentence. 545 U.S. at 655-64. Rather, under the construction of the rule approved in *Mayle*, Rule 15(c) permits relation back of habeas claims asserted in an amended petition "only when the claims added by amendment arise from the same core facts as the timely filed claims, and not when the new claims depend upon events separate in 'both time and type' from the originally raised episodes." 545 U.S. at 657. In this regard, the reviewing court looks to "the existence of a

[2] Reid does not argue that any other subsection of § 2244(d)(1) applies in this case.

common 'core of operative facts' uniting the original and newly asserted claims." A claim that merely adds "a new legal theory tied to the same operative facts as those initially alleged" will relate back and be timely. 545 U.S. at 659 & n.5.

The Ninth Circuit has set forth a two-step analysis to determine whether a claim relates: (1) "determine what claims the amended petition alleges and what core facts underlie those claims"; and (2) "for each claim in the amended petition, ... look to the body of the original petition and its exhibits to see whether the original petition 'set out' or 'attempted to ... set out' a corresponding factual episode, *see* Fed. R. Civ. P. 15(c)(1)(B)—or whether the claim is instead 'supported by facts that differ in both time and type from those the original pleading set forth,' *Mayle*, 545 U.S. at 650, 664, 125 S. Ct. 2562." *Ross v. Williams*, 950 F.3d 1160, 1167-68 (9th Cir. 2020). It is not required that the "facts in the original and amended petitions be stated in the same level of detail." *Id.*

The parties agree that Reid's federal petition was filed almost two weeks after the federal statute of limitations expired. However, Reid asserts that he was abandoned by counsel, who never advised him of the conclusion of his direct appeal. He argues he therefore be allowed equitable tolling through the filing of both the original *and* first amended petitions.

Equitable tolling is appropriate only if the petitioner can show that: (1) he has been pursuing his rights diligently, and (2) some extraordinary circumstance stood in his way and prevented timely filing. *Holland v. Florida*, 560 U.S. 631, 649 (2010). "[F]or

a litigant to demonstrate 'he has been pursuing his rights diligently,' . . . he must show that he has been reasonably diligent in pursuing his rights not only while an impediment to filing caused by an extraordinary circumstance existed, but before and after as well, up to the time of filing his claim in federal court." *Smith v. Davis*, 953 F.3d 582, 598-99 (9th Cir. 2020) (en banc).

"The diligence required for equitable tolling purposes is 'reasonable diligence,' not 'maximum feasible diligence.'" *Holland*, 560 U.S. at 653.

> In determining whether reasonable diligence was exercised courts shall consider the petitioner's overall level of care and caution in light of his or her particular circumstances and be guided by decisions made in other similar cases with awareness of the fact that specific circumstances, often hard to predict in advance, could warrant special treatment in an appropriate case.

Smith, 953 F.3d at 599 (internal punctuation and citations omitted).

Equitable tolling is "unavailable in most cases," *Miles v. Prunty*, 187 F.3d 1104, 1107 (9th Cir. 1999), and "the threshold necessary to trigger equitable tolling is very high, lest the exceptions swallow the rule," *Miranda v. Castro*, 292 F.3d 1063, 1066 (9th Cir. 2002) (quoting *United States v. Marcello*, 212 F.3d 1005, 1010 (7th Cir. 2000)). The petitioner ultimately has the burden of proof on this "extraordinary exclusion." *Id.* at 1065. He accordingly must demonstrate a causal relationship between the extraordinary circumstance and the lateness of his filing. *E.g.*, *Spitsyn v. Moore*, 345 F.3d 796, 799 (9th Cir. 2003). *Accord Bryant*

v. Arizona Attorney General, 499 F.3d 1056, 1061 (9th Cir. 2007). "[I]t is only when an extraordinary circumstance prevented a petitioner acting with reasonable diligence from making a timely filing that equitable tolling may be the proper remedy.'" *Smith*, 953 F.3d at 600.

Reid was sentenced on December 1, 2015. (ECF No. 45). Judgment of conviction was entered on December 7, 2015, and counsel filed a notice of appeal that same date. (ECF Nos. 47 & 48).

On January 12, 2016, Reid sent his attorney, Michael Sanft, a letter that asked for confirmation that his appeal had been filed and for a copy of his appeal and of the sexual assault examination report.[3] (ECF No. 17-2). In the letter, Reid noted that it was his second letter to Sanft, that Sanft had not responded to his first letter and that no one ever answered the phones at Sanft's office. (*Id.*) Two weeks later, Reid sent a letter to the state court that explained he had been trying to reach his attorney with no success and requested any help the court might be able to offer in that regard. (ECF No. 17-3).

Five months later, on July 2, 2016, Reid sent a letter to an investigator.[4] (ECF No. 17-4). In the letter, Reid explained that he had been trying without success to reach Sanft and asked the investigator if he could send him a copy of the sexual assault

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[3] The respondents have not contested the authenticity of this or any other item of evidence submitted by the petitioner.

[4] Although neither party explains whether the investigator had worked on Reid's case or in Sanft's employ, the contents of the letter suggest that Reid at least believed the investigator was either familiar with Reid's case or familiar enough with Sanft to be able to contact him.

exam and advise whether his appeal had been filed. Three weeks later, on July 23, 2016, Reid sent a second letter to the trial court. (ECF No. 17-5). In his letter, Reid again complained of an inability to contact Sanft and asked the trial court for help. (*Id.*) In each letter, Reid appears unaware his appeal had been decided just a few months before.

There is no evidence that anyone – the investigator, Sanft or the state court – responded in any fashion to Reid's requests for information. In addition, that Reid was unable to contact or obtain any response from Sanft is corroborated by accounts from several of his family members, including two who were also unable to reach Sanft on Reid's behalf during this time period. (ECF Nos. 49-1, 49-2, 49-4, 49-5 & 49-6).

Nearly a year after sending his last letter to the state court, Reid moved to withdraw Sanft as counsel on July 17, 2017. (Ex. 65). In his motion, Reid also asked the court to order Sanft to turn over his case file. (*Id.*) On July 25, 2017, on the advice of another inmate, Reid pulled a copy of his state court docket. It was then, he claims, he finally learned that his appeal had been decided.

"[I]f a petitioner's attorney 'fail[s] to satisfy professional standards of care,' and if the failure contributes to the untimely filing of a federal petition, the petitioner may be entitled to equitable tolling." *Holland*, 560 U.S. at 649. An attorney's "[f]ailure to inform a client that his case has been decided, particularly where that decision implicates the client's ability to bring further proceedings and the attorney has committed

himself to informing his client of such a development, constitutes attorney abandonment" justifying equitable tolling. *Gibbs v. Legrand*, 767 F.3d 879, 886 (9th Cir. 2014).

The uncontested evidence before the court is that Sanft, who was acting as Reid's attorney and was thus receiving notice of court filings on Reid's behalf, never advised Reid that his appeal had concluded. Reid tried repeatedly to obtain initiate contact with his counsel regarding his appeal with letters to counsel, an investigator, and the trial court -- to no avail. The court therefore concludes Sanft abandoned Reid. That, coupled with the failure of any other person or entity to respond to Reid's multiple requests for information, was an extraordinary circumstance that prevented the timely filing of Reid's federal petition.

The court further concludes that Reid exercised reasonable diligence before, during and after the extraordinary circumstance prevented timely filing. Reid made several attempts to contact his attorney through multiple avenues – phone calls, letters to counsel, a letter to an investigator, and letters to the court. He did not send just one letter, as respondents argue. After receiving no responses during the seven-month period, Reid paused his efforts to obtain information. However, after a year of silence, Reid moved to have counsel withdrawn and his case file turned over and, on advice of another inmate, ran his docket to discover his appeal had been decided. Under the circumstances of this case, and similar to other cases, it was not unreasonable for Reid to wait a year before taking further actions to ascertain the status of his appeal. *See, e.g., Fue v. Biter*, 842 F.3d 650, 654-55 (9th Cir.

2016).

Respondents argue that Sanft was not appointed to file a postconviction petition for Reid, but that is beside the point. Saft was responsible for alerting Reid that his appeal had been decided and it was reasonable for Reid to wait for his direct appeal to be decided before filing his state postconviction petition, *Loveland v. Hatcher*, 231 F.3d 640, 644 (9th Cir. 2000) ("If a defendant reasonably believes that his counsel is pursuing his direct appeal he most naturally will not file his own post-conviction relief petition. Indeed, a defendant could seriously prejudice his case if he were to prepare and file a habeas petition while his counsel was pursuing his direct appeal."), and to wait for his state petition to be filed before filing his federal petition. Thus, it was Sanft's failure to advise Reid of the status of his appeal that precluded Reid from timely filing his federal habeas petition.

Respondents also assert that the state courts' factual findings, made in connection with Reid's untimely state petition, are entitled to deference.[5] In affirming the dismissal of Reid's state court postconviction petition, the Nevada Court of Appeals made the following factual findings:

> Reid did not allege that counsel affirmatively misrepresented the status of his appeal. Further, the record before this court demonstrates Reid knew how to

[5] The state courts' legal findings are not entitled to deference in this context. *See Holland v. Florida*, 560 U.S. 631, 650 (2010) ("Equitable tolling . . . asks whether federal courts may excuse a petitioner's failure to comply with federal timing rules, an inquiry that does not implicate a state court's interpretation of state law.").

> request information directly from both the district court and the appellate court. Reid did not explain his delay in requesting that information. Based on these facts, Reid failed to demonstrate cause for the delay.

(Ex. 94 at 2). First, the Court of Appeals made no finding that Sanft did not abandon Reid. Second, unaddressed by the Court of Appeals is the significance of the two letters Reid sent directly to the trial court in which he sought assistance contacting his attorney -- letters that also indicated that Reid was completely unaware of, and concerned about, the status of his appeal. Nor did the Court of Appeals address the absence of any evidence that the trial court responded to these letters, either by sending Reid a copy of the order denying his appeal or forwarding his letter to his court-appointed attorney with a directive that he contact his client. This is, in the court's opinion, the most critical evidence showing Reid exercised reasonable diligence. In sum, as this court's findings are not at odds with those made by the state courts, the deference due their factual findings does not preclude application of equitable tolling in this case.

Accordingly, as Reid has met both requirements for equitable tolling, the original petition -- filed two weeks after the expiration of the federal statute of limitations -- is deemed timely filed. Having so decided, the next question is whether the claims in the first amended petition may be considered timely filed.[6]

[6] The second amended petition presents the same claims as those in the first amended petition. Accordingly, if the first amended petition is timely, the second amended petition – the operative petition in this case – is also timely.

Reid argues first that his first amended petition should be subject to equitable tolling on the basis that counsel relied on Ninth Circuit cases endorsing a stop-clock approach to equitable tolling when deciding when to file the amended petition. Although there is Ninth Circuit case law holding that equitable tolling may be granted when a petitioner's attorney reasonably relies on the unsettled law in deciding when to file his petition, *Williams v. Filson*, 908 F.3d 546, 559 (9th Cir. 2018), the court need not decide whether this law applies in the context of this case. The claims in the first amended petition may be deemed timely through application of relation-back and other equitable tolling principles.

The first amended petition asserts the following claims: (1) Reid's plea was not knowing and voluntary because (a) he made it without first having seen the victim's sexual assault examination report and (b) his attorney grossly mischaracterized the likelihood that he would receive probation if he pled; (2) trial counsel was ineffective on the same facts alleged in Ground One; and (3) appellate counsel was ineffective on the same facts as Ground One.

In his original petition, in relevant part, Reid asserts that trial counsel was ineffective because the sexual assault exam report had been withheld but counsel nevertheless failed to request a continuance of trial, which forced Reid into an unfavorable plea. (ECF No. 6 at 5). The core of operative facts supporting this ineffective assistance of counsel claim is that Reid entered his plea without the benefit of the sexual assault examination report,

which are the same operative facts underlying his claims that his plea was involuntary because it was made without the report, and that trial and appellate counsel were ineffective for the same reason. *See Nguyen v. Curry*, 736 F.3d 1287, 1296–97 (9th Cir. 2013) (holding that a claim that appellate counsel was ineffective for failing to raise double jeopardy related back to a timely raised substantive double jeopardy claim), *abrogated on other grounds by Davila v. Davis*, – U.S. –, 137 S. Ct. 2058 (2017). Accordingly, those parts of Grounds One, Two and Three based on the sexual assault examination report relate back to the original petition and are timely.

The operative facts underlying Reid's claims that counsel ineffectively predicted that Reid would get probation, however, are not to be found in the original petition. While Reid references his motion to withdraw guilty plea, which in turn references (but is not based on) counsel's estimate that Reid would get probation, this is insufficient for relation back purposes. First, the motion to withdraw is not attached to the petition and is not therefore considered part of the petition. Second, there is no attempt by Reid to incorporate the contents of the motion to withdraw as part of his petition. Accordingly, those parts of Grounds One, Two and Three that rely on counsel's estimation of the likelihood of probation do not relate back to the original petition.

However, the court is persuaded by Reid's alternative argument that equitable tolling should apply through the filing of his first amended petition for at least this claim on the grounds of attorney abandonment and lack of a case file. Under some

circumstances, the lack of a case file might justify equitable tolling, *see Waldron-Ramsey v. Pacholke*, 556 F.3d 1008, 1013 (9th Cir. 2009); *Lott v. Mueller*, 304 F.3d 918, 924-25 (9th Cir. 2002), if "the hardship caused by lack of access to [the] materials was an extraordinary circumstance that caused" the untimely filing of the federal petition. *See Waldron-Ramsey*, 556 F.3d at 1013. Counsel argues, and the respondents do not dispute, that the transcripts for Reid's change of plea and sentencing were not available until May 2018. The court is further persuaded that the probation claim could not have been ascertained without first reviewing those transcripts. As such, the court concludes that Reid's claims based on counsel's advice about probation were not available until May 2018 and that counsel acted diligently in preparing and filing the first amended petition asserting that claim less than three months later.

In sum, the court concludes that, through application of equitable tolling and relation back, the claims in the first amended petition, and by extension the second amended petition, are timely.

III. Procedural Default

The respondents argue that even if the petition is deemed timely, all of Reid's claims are procedurally defaulted.

A federal court cannot review a claim "if the Nevada Supreme Court denied relief on the basis of 'independent and adequate state procedural grounds.'" *Koerner v. Grigas*, 328 F.3d 1039, 1046 (9th Cir. 2003). In *Coleman v. Thompson*, the Supreme Court held that a state prisoner who fails to comply with the state's procedural

requirements in presenting his claims is barred from obtaining a writ of habeas corpus in federal court by the adequate and independent state ground doctrine. *Coleman v. Thompson*, 501 U.S. 722, 731-32 (1991). A state procedural bar is "adequate" if it is "clear, consistently applied, and well-established at the time of the petitioner's purported default." *Calderon v. United States District Court (Bean)*, 96 F.3d 1126, 1129 (9th Cir. 1996). A state procedural bar is "independent" if the state court "explicitly invokes the procedural rule as a separate basis for its decision." *Yang v. Nevada*, 329 F.3d 1069, 1074 (9th Cir. 2003). A state court's decision is not "independent" if the application of the state's default rule depends on the consideration of federal law. *Park v. California*, 202 F.3d 1146, 1152 (9th Cir. 2000).

The Nevada Court of Appeals affirmed dismissal of Reid's state postconviction petition on the grounds that it was untimely. The Ninth Circuit has held that the Nevada Supreme Court's application of the timeliness rule in § 34.726(1) is an independent and adequate state law ground for procedural default. *Moran v. McDaniel*, 80 F.3d 1261, 1268-70 (9th Cir. 1996); *see also Valerio v. Crawford*, 306 F.3d 742, 778 (9th Cir. 2002). Accordingly, Reid's claims are procedurally defaulted.

A procedural default may be excused only if "a constitutional violation has probably resulted in the conviction of one who is actually innocent," or if the prisoner demonstrates cause for the default and prejudice resulting from it. *Murray v. Carrier*, 477 U.S. 478, 496 (1986).

To demonstrate cause for a procedural default, the petitioner must "show that some objective factor external to the defense impeded" his efforts to comply with the state procedural rule. *Murray*, 477 U.S. at 488. For cause to exist, the external impediment must have prevented the petitioner from raising the claim. *See McCleskey v. Zant*, 499 U.S. 467, 497 (1991).

With respect to the prejudice prong, the petitioner bears "the burden of showing not merely that the errors [complained of] constituted a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire [proceeding] with errors of constitutional dimension." *White v. Lewis*, 874 F.2d 599, 603 (9th Cir. 1989) (citing *United States v. Frady*, 456 U.S. 152, 170 (1982)).

Reid asserts that the abandonment of counsel discussed above constitutes cause for the default of his claims. In *Maples v. Thomas*, 565 U.S. 266, 271, 289 (2012), the Supreme Court held that abandonment by counsel at a critical time for the petitioner's state postconviction petition can constitute cause to excuse a procedural default. As the court has already found, the evidence before the court supports the conclusion that Reid was abandoned by Sanft at a time critical to his state postconviction petition, *i.e.*, during the time period in which he could have filed a timely state postconviction petition in order to properly exhaust his federal claims. Sanft not only failed to advise Reid that his appeal had been decided, he utterly failed to respond to multiple attempts by Reid to contact him about the status of his case. This amounted to abandonment in the circumstances of this case and

therefore constitutes cause for the procedural default of Reid's claims.[7]

Whether Reid has suffered prejudice as a result, however, is a question that is inextricably intertwined with the merits of Reid's claims. The court will therefore defer a determination of whether Reid has suffered prejudice until the time of merits consideration.

IV. Conclusion

In accordance with the foregoing, IT IS THEREFORE ORDERED that the respondents' motion to dismiss (ECF No. 36) is DENIED.

IT IS FURTHER ORDERED that respondents shall file an answer to the second amended petition within sixty days of the date of this order. In filing the answer, respondents must comply with the requirements of Rule 5 of the Rules Governing Section 2254 Cases in the United States District Courts and shall specifically cite to and address the applicable state court written decision and state court record materials, if any, regarding each claim within the response as to that claim.

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[7] The respondents' argument that the court must defer to the state courts' finding that no cause existed for the untimely filing of the state petition is without merit. "[T]he question whether a petitioner's procedural default is excused by cause and prejudice for purposes of federal habeas review is a federal, not state, question." *Visciotti v. Martel*, 862 F.3d 749, 768 n.10 (9th Cir. 2016).

IT IS FURTHER ORDERED that Reid will have sixty days from service of the answer within which to file a reply.

IT IS SO ORDERED.

DATED this 22nd day of March, 2021.

Howard D McKibben

UNITED STATES DISTRICT JUDGE